IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DR. MELVIN HARTER, Plaintiff/Appellant, v. COCHISE COUNTY, a body politic; COCHISE COUNTY BOARD OF SUPERVISORS; and COCHISE COUNTY HEARING OFFICER, Defendants/Appellees.	2 CA-CV 2007-0070 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV200500884

Honorable Peter B. Swann, Judge

AFFIRMED

Eric Post — Tucson
Attorney for Plaintiff/Appellant

Ed Rheinheimer, Cochise County Attorney
By Britt W. Hanson — Bisbee
Attorneys for Defendants/Appellees

B R A M M E R, Judge.

¶1 Appellant Melvin Harter appeals from the superior court's judgment affirming an administrative determination by Cochise County (the county) finding him in violation of several county zoning regulations. Harter argues that his activities did not violate any zoning ordinances and that the county's regulation of his use of his property violated his First Amendment rights. He further asserts the county's citation was duplicitous and the fines imposed were excessive. We affirm.

Factual and Procedural Background

¶2 The facts necessary to our decision are essentially undisputed. In 1999, Harter purchased a parcel of land in the county, on which existed a church, a recreational vehicle (RV) park, and Bible college facilities, including dormitories. Between April 1 and April 26, 2005, Harter housed up to one hundred Minutemen in the dormitories, the RV park, and in tents on the property. Harter charged the Minutemen for the lodging, earning a total of $9,655. Harter had not obtained permits from the county for these activities.

¶3 The county later cited Harter, alleging he had violated several zoning ordinances by housing the Minutemen on his property without permits. After a hearing on September 15, 2005,[1] a county hearing officer found that Harter had "utiliz[ed] the property for guest lodging, including the dormitories [and] RV Park" without permits from April 1 through April 26, 2005, thereby violating "[a]rticles 607, 1704, 1716, 2310, and 2304 of the Cochise County Zoning Regulations." The hearing officer fined Harter $9,655, to be

[1]Although the transcript of the September 15 hearing is not included in the record on appeal, we, based on the parties' stipulation at oral argument, take notice of the copy of the transcript attached to the county's answering brief. *See* Ariz. R. Civ. App. P. 11(e).

paid within thirty days, and an additional $50 for each day thereafter that Harter failed to pay the fine. The Cochise County Board of Supervisors affirmed the hearing officer's decision on review. Harter then sought review of that decision in the Cochise County Superior Court pursuant to the Administrative Review Act, A.R.S. §§ 12-901 through 12-914. After hearing oral argument by the parties and reviewing the record, the superior court affirmed. This appeal followed.

Discussion

Zoning violation

¶4 Harter asserts he did not violate the county's zoning ordinances because, he contends, he did not need permits to lodge the Minutemen.[2] In reviewing a superior court's judgment upholding an administrative decision, we do not "substitute [our] judgment for that of the agency on factual questions." *Webb v. State ex rel. Ariz. Bd. of Med. Exam'rs*, 202 Ariz. 555, ¶ 7, 48 P.3d 505, 507 (App. 2002). Rather, we examine the record to determine "'whether the administrative action was illegal, arbitrary, capricious or involved an abuse of discretion.'" *McMurren v. JMC Builders, Inc.*, 204 Ariz. 345, ¶ 7, 63 P.3d 1082, 1085 (App. 2003), *quoting Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Prods., Inc.*, 167 Ariz. 383, 386, 807 P.2d 1119, 1122 (App. 1990); *see Webb*, 202 Ariz. 555, ¶ 7, 48 P.3d at 507; A.R.S. § 12-910(E). "We apply our independent judgment, however, to

[2]Attempting to attack the administrative citation with arguments not previously raised, Harter contended at oral argument that, based on the definition of "guest lodging," he could not have been cited for his use of the RV park and tents. We do not, however, address arguments raised for the first time at oral argument. *Tritschler v. Allstate Ins. Co.*, 213 Ariz. 505, n.1, 144 P.3d 519, 525 n.1 (App. 2006).

questions of law." *Webb*, 202 Ariz. 555, ¶ 7, 48 P.3d at 507; *see McMurren*, 204 Ariz. 345, ¶ 7, 63 P.3d at 1085.

¶5 It is undisputed that Harter's property is zoned RU-4 (rural, minimum of four acres). Under the county's zoning regulations, "principal" uses of rural property, including use for church purposes, do not require permits. Cochise County Zoning Regulation (C.C.R.) § 603.04. Likewise, "accessory" uses do not require a permit, *see* C.C.R. § 203, although other uses, including "special uses," do. RV parks and "guest lodging" are among the special uses requiring a permit. *See* C.C.R. §§ 607.01, 607.02, 1716. Guest lodging is defined as: "A building . . . or an area of accommodation for overnight or short term lodging such as a hotel or motel, resorts, guest ranches, group camps, and campgrounds and may include recreational facilities, restaurants, meeting rooms or similar facilities." C.C.R. § 203.

¶6 Harter's housing the Minutemen for a fee at the Bible college dormitories and the RV park, then, appears to fall squarely within the definition of special uses requiring a permit. *See* C.C.R. § 203. Nonetheless, Harter contends his use of the Bible college did not constitute "guest lodging" because, he maintains, he "did not make a profit." Instead, he claims, he used the fees he collected only to cover the cost of housing the Minutemen, such as "utilities, propane, [and] food." Whether Harter made a profit, however, is not determinative; section 203 does not differentiate between for-profit and non-profit lodging.

¶7 Harter also argues that permits were not required to lodge the Minutemen because the Bible college is an accessory use to his church. Pursuant to § 203, accessory uses, which do not require permits, are those "on the same site and of a nature customarily

incidental and subordinate in size, impact and purpose to the principal structures or uses." Relying on cases from other jurisdictions, Harter asserts there is "ample authority . . . establish[ing] that church schools are deemed to be accessory." *See City of Richmond Heights v. Richmond Heights Presbyterian Church*, 764 S.W.2d 647, 648 (Mo. 1989) (day-care program accessory to church); *City of Concord v. New Testament Baptist Church*, 382 A.2d 377, 380 (N.H. 1978) (parochial school accessory to church). There is also limited authority for the proposition that places of religious study with residential facilities may be an accessory use to a church. *See City of Minneapolis v. Church Universal & Triumphant*, 339 N.W.2d 880, 888-89 (Minn. 1983) (monastery).

¶8 Although we find no Arizona authority addressing this issue, we note several cases from other jurisdictions finding schools not to be accessory uses to churches. *See, e.g. Abram v. City of Fayetteville*, 661 S.W.2d 371, 373 (Ark. 1983) (parochial school not accessory use); *City of Las Cruces v. Huerta*, 692 P.2d 1331, 1333 (N.M. Ct. App. 1984) (same); *Medford Assembly of God v. City of Medford*, 695 P.2d 1379, 1380-81 (Or. Ct. App. 1985) (primary school not accessory to church); *Damascus Cmty. Church v. Clackamas County*, 610 P.2d 273, 276 (Or. Ct. App. 1980) (parochial school not accessory use). Similarly, we find no Arizona authority holding that a Bible college, especially one with residential facilities, is "customarily incidental" or "subordinate in . . . impact and purpose" to a church. C.C.R. § 203. And, even were we to conclude that a Bible college is an accessory use to a church, Harter's use of its facilities here would not fit within that definition.

¶9 Harter does not suggest that, in housing the Minutemen, he was using his Bible college for educational purposes. He does not assert the Minutemen were enrolled in, attended, or were in any way affiliated with the Bible college. And, although Harter contends he was holding a "revival" during the period he housed the Minutemen, he points to nothing in the record suggesting any of the Minutemen actually participated in it.

¶10 Harter also suggests in passing that the RV park is a grandfathered use and, therefore, exempt from the county's regulations.[3] Because he does not develop this argument further, however, we do not address it. *See Lohmeier v. Hammer*, 214 Ariz. 57, n.5, 148 P.3d 101, 108 n.5 (App. 2006).

First Amendment

¶11 Harter contends the county's regulation of his use of his property violated the First Amendment to the United States Constitution. He first asserts the county impermissibly defined "revival" when determining the activities held on his church property violated the county's zoning ordinances, thereby violating the First Amendment's establishment clause. His argument, however, appears to be based on a misapprehension of fact. Although the county's citation alleged Harter had violated, inter alia, ordinances requiring permits for "events of public interest," which include "revivals," the hearing officer did not find Harter had violated those provisions. *See* C.C.R. § 1817. Rather, the hearing officer found Harter had violated county ordinances requiring "special use" permits for

[3]Although the county spends a considerable portion of its brief arguing that Harter's Bible college is not grandfathered, for purposes of this appeal Harter does not contend that it is.

"guest lodging" and RV parks. *See* C.C.R. §§ 607, 1716. Contrary to Harter's assertion, that determination did not require the county to define "religious procedures."

¶12 Harter next suggests the county's regulation of his activities violated the First Amendment's free exercise clause, apparently because he contends his housing of the Minutemen was incident to a religious revival. Harter concedes that, under applicable Supreme Court precedent, valid, neutral laws of general applicability, including zoning ordinances, that nonetheless affect religious conduct do not violate the free exercise clause. *See Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"), *quoting United States v. Lee*, 455 U.S. 252, 263 n.3 (1982); *see also City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) (federal statute limiting *Employment Div.* unconstitutional); *Cochise County v. Broken Arrow Baptist Church*, 161 Ariz. 406, 409, 778 P.2d 1302, 1305 (App. 1989) ("The first amendment does not preclude government activity such as building and zoning regulations as applied to religious organizations.").[4]

¶13 Harter nonetheless contends he was cited by the county not as the result of a neutral ordinance but, rather, unconstitutional "targeting." As evidence that the county

[4]Despite his concession, Harter suggests *Broken Arrow* is inapposite because it "was about the manufacture of Bibles, not the practice of religion and revivals." Although its facts are distinguishable, insofar as *Broken Arrow* addresses the permissibility of zoning regulations that, in effect, prohibit religious activities, it is relevant here.

targeted him, Harter first raises the county's "inconsistency" in failing to regulate another thirty-day revival held in a nearby town. The transcript from the September 15 hearing, however, indicates that county officials were unaware of the other revival, and thus any resulting inconsistency was unintentional. Pointing to the county planning director's testimony, Harter further suggests the county cited him after it had initially "clearly stated that a 30-day revival did not need a permit." But the testimony on which Harter relies demonstrates that, although the county indeed informed Harter that he would not need a permit for a revival held within his church, the county advised him that he would need a permit to use the Bible college and RV park for lodging.

¶14 As further proof of targeting, Harter asserts that the county sent him a memorandum threatening citation "for having a revival," not "for violating a zoning ordinance." He also contends that the hearing officer had "prior hard feelings" for him and that a member of the county's Board of Supervisors "public[ly] chastised" him prior to his citation and "later attempted to sit on the Board in review of the grievance." To support those contentions, however, Harter relies on documents that are not included in the record on appeal. "A party is responsible for making certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised on appeal," and "[w]hen a party fails to include necessary items, we assume they would support the court's findings and conclusions." *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995); *see also* Ariz. R. Civ. App. P. 11(b)(1). Accordingly, we do not further address this issue.

Citation and fines

¶15 Harter contends the county's citation, which cited him for a zoning violation occurring over a twenty-six day period, was improper because it "d[id] not charge separate counts" for each day. He asserts that, "if an individual is cited with multiple offenses, either separate complaints must be filed for each offense or separate counts must be contained in the same complaint." Harter concedes, however, that A.R.S. § 11-808, which provides for the enforcement of county zoning ordinances, "does not specifically state that a separate complaint must be filed for each violation." Harter cites—and we find—nothing suggesting that the form of the citation the county issued was improper.

¶16 Nonetheless, Harter suggests the county's service of the citation on the last day he housed the Minutemen was duplicitous because the county had "ha[d] deputies at the property from the very beginning." Therefore, he asserts, his fine should be reduced to $750, for a single-day violation. Again, Harter cites no legal authority in support of his argument, thus we do not address it further. *See In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 28, 18 P.3d 85, 93 (App. 2000) ("[Appellant's] bald assertion is offered without elaboration or citation to any . . . legal authority. We will not consider it.").

¶17 Finally, Harter argues that the original $9,655 fine, as well as the additional fine of $50 for each day the principal fine remained unpaid after thirty days, is excessive and therefore unconstitutional under the Eighth Amendment.[5] Again, Harter neither cites

[5]At oral argument in this court, Harter asserts for the first time that because he should not have been cited for his use of the RV park and tents, his fine should be apportioned and

authority for his argument nor develops it in any meaningful way, so we do not address it.[6] *See Lohmeier*, 214 Ariz. 57, n.5, 148 P.3d at 108 n.5; *In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 28, 18 P.3d at 93.

Disposition

¶18 We affirm the trial court's judgment upholding the county's administrative determination.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge

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reduced accordingly. Because we have already rejected the premise for that argument, we need not reach the issue.

[6]We note that Harter's fine was less than half the maximum amount allowable by statute. *See* A.R.S. § 11-808(D) (stating "[e]ach day of the continuance of the violation constitutes a separate violation" and limiting potential fine to "the amount of the maximum fine for a class 2 misdemeanor"); *see also* A.R.S. § 13-802(B) (maximum fine for class 2 misdemeanor $750).